JD(SF)–61–04
Santa Fe, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

ST. VINCENT HOSPITAL

and **Case 28-CA-19039**

NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES
DISTRICT 1199 NM, AFSCME, AFL-CIO

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for the General Counsel
George Cherpelis, Esq. of Scottsdale, Arizona,
and **Danny W. Jarrett, Esq.,** of
Albuquerque, New Mexico, for the
Respondent
Shirley Cruse, of Santa Fe, New Mexico,
Lead Negotiator for Respondent's Nursing
and Technical Units, National Union of Hospital and
Health Care Employees, District 1199NM,
AFSCME, AFL-CIO

DECISION

Mary Miller Cracraft, Administrative Law Judge: At issue is whether St. Vincent Hospital (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act)[1]

- by unilaterally granting sign-on and/or relocation bonuses to applicants for employment and unilaterally granting a transfer bonus to an employee without prior notice to National Union of Hospital and Health Care Employees District 1199NM, AFSCME, AFL-CIO (the Union) and without affording the Union an opportunity to bargain regarding the bonuses and the effects of these bonuses;

- by refusing to bargain with the Union regarding sign-on bonuses and relocation bonuses to be offered to applicants for employment;

- by bypassing the Union and dealing directly with unit employees regarding sign-on and relocation bonuses and a transfer bonus.

[1] Sec. 8(a)(1) of the National Labor Relations Act, 29 U.S.C. Sec. 158(a)(1), provides, as relevant here, that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in their right to engage in union activities. Sec. 8(a)(5) of the Act, 29 U.S.C. Sec. 158(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with a duly designated representative of its employees.

On the entire record, [2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following

Findings of Fact

I. Jurisdiction and Labor Organization Status

Respondent is a New Mexico nonprofit corporation with an office and place of business in Santa Fe, New Mexico, where it is engaged in the operation of a general acute care hospital. During the 12-month period ending October 3, 2003, Respondent derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of New Mexico. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent recognizes the Union as the exclusive collective-bargaining representative of two units of employees: a nursing unit and a technical unit. In 1978, in Case 28-AC-28, the Union was certified as the exclusive collective-bargaining representative of a unit of nurses, an appropriate unit within the meaning of Section 9(b) of the Act. At all times since 1978, the Union has been the exclusive collective-bargaining representative of the nurses unit based on Section 9(a) of the Act. The nurses unit is described as follows:

> All registered nurses and licensed practical nurses employed by Respondent, excluding all other employees, all other professional and technical employees, confidential employees, clerical employees, aides, orderlies, dieticians, pharmacists, head nurses, guards, watchmen, and supervisors as defined in the Act as amended.

In 1989, in Case 28-RC-4642, the Union was certified as the exclusive collective-bargaining representative of a unit of technicians, an appropriate unit within the meaning of Section 9(b) of the Act. At all times since 1989, the Union has been the exclusive collective-bargaining representative of the technicians unit based on Section 9(a) of the Act. The technical unit is described as follows:

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[2] This case was tried in Santa Fe, New Mexico, on April 27 and 28, 2004. The charge and amended charge were filed by the Union on October 3, 2003, and December 19, 2003, respectively. Complaint issued on December 30, 2003. General Counsel's motion to correct the transcript is hereby granted. The motion to supplement GCEx. 2 with 2 missing pages is unnecessary as the official version of the exhibit is not missing those pages.

[3] Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

All respiratory therapists, x-ray technicians, radiation therapists, EKG technicians, EEG technicians, and Polysom technicians, excluding all other employees, all professional employees, casual employees, guards, watchmen and supervisors as defined in the Act.

B. Pre-April 2003 Sign-on and Relocation Bonus Plan and Transfer Bonus Plan

The issues in this case arise from the current nationwide shortage of nurses. In 2002, Respondent began hiring contract nurses or travelers for specified periods of time, usually 13 weeks, to supplement its work force. The expense of travelers is far greater than the expense of a permanent employee. Respondent and the Union agreed to limit the number of travelers hired by Respondent.

Although Respondent has been offering a $2000 recruitment bonus to nurse-applicants since 2001, by August 2002 Respondent nevertheless had 44 vacancies for registered nurses. Pauline Welborn-Brown, vice-president of human resources, leadership and learning, was charged with creating a strategy for successful recruitment of permanent nursing staff. Welborn-Brown's plan encompassed hiring a professional nurse recruiter as well as offering up to an $8000 sign-on bonus in addition to a $2000 relocation bonus, already in existence.

Respondent structured the $8000 sign-on bonus to be paid out over a period of 3 years. One thousand dollars was paid after 6 months' employment; another $1000 at 12 months; then $1500 at 18, 24, 30, and 36 months. Each time the bonus was earned, it was reflected as wages for tax purposes and withholdings, including FICA withholdings, were made from the bonus amount. If the nurse did not remain employed for the entire 3-year pay out period, the nurse forfeited whatever amount of bonus remained to be paid.

On August 21, 2002, a regular Wednesday labor management meeting took place. Present were Jane Brantley, director of human resources; Delma DeLora, president of the nurses' unit; Shirley Cruse, head of the technicians' unit and lead negotiator for both units; Crystal VonWhipperman, director of clinical recruitment and retention; and Welborn-Brown. Welborn-Brown explained to DeLora and Cruse that VonWhipperman had been hired to address the nursing shortage. VonWhipperman then explained the entire bonus program including an $8000 applicant sign-on bonus as well as bonuses for current employees. In fact, the $8000 applicant sign-on bonus was already in effect at the time of this meeting. It was probably instituted a few weeks before the meeting. All parties agree that the Union was not given notice or an opportunity to bargain with respect to the $8000 applicant sign-on bonus prior to its implementation.

At the August 21, 2002, meeting, neither Welborn-Brown nor VonWhipperman specifically suggested bargaining with the Union about the bonus program or any part of the bonus program. Brantley explained that Respondent asked what the Union thought about the recruitment program, including the bonuses. At the end of the presentation, DeLora testified that she requested that Welborn-Brown provide her a written description of the bonus plan. Welborn-Brown denied that she was asked to prepare a written description of the entire bonus program including applicant sign-on bonuses. Welborn-Brown recalled that DeLora asked for something in writing relating to current employees. VonWhipperman agreed with Welborn-Brown's testimony. Brantley did not recall any discussion about preparation of a memorandum of understanding.

In any event, by memorandum of understanding dated October 1, 2002, from Welborn-Brown to DeLora, the portion of the bonus program relevant to current nurses was set forth. Nurses who were willing to transfer to any hard to fill unit including "ICU/CCU/PCU/ED & Med/Surg" were eligible for the bonus. Welborn-Brown also outlined the portion of the bonus program relevant to "ICU/CCU/PCU/ED & Med/Surg" per diem nurses who were willing to convert from per diem status to full-time employment in the hard to fill units. The memorandum concluded: "We would like to offer the above bonus program to current employees starting October 10, 2002. We would like your formal acceptance of this program. Please respond no later than Thursday October 3 at 12 noon."

On October 20, 2002, Respondent and the Union signed the memorandum of October 1, 2002, which offered an internal $8000 bonus for unit nurses who transferred into hard-to-fill positions on a full-time basis and per diem nurses in the hard-to-fill units who agreed to transfer to full-time employee status from their per diem status. In order to qualify, the terms of the agreement required that individuals opt to take advantage of the internal bonus program between October 10 and November 19, 2002.

Thus, at least by October 2002, Respondent's standard hiring process contemplated a job offer to the applicant as well as the offer of up to an $8000 sign-on bonus and a relocation bonus. Once these terms were agreed to, Respondent verified the applicant's licensure and references and the applicant was required to prove physical fitness for the job. Drug screening and current immunizations were checked. Once these requirements were satisfactorily met, the individual was allowed to begin work for Respondent. In many cases, the applicant did not sign the sign-on bonus agreement until after his or her first day of employment.

C. Alleged unilateral grant of sign-on and relocation bonuses to applicants; Alleged direct dealing

The parties agree that from April to October 2003, Respondent awarded sign-on bonuses to Mary Kallenberg, Sherri Chavez, Karen Golus, Kristine Kaskey, and Heather Schultz. The Union was not involved in discussions between these applicants/employees and Respondent even though some of these discussions occurred after employment began.

D. Alleged unilateral grant of a transfer bonus to a current employee; Alleged direct dealing

DeLora and Welborn-Brown executed a second memorandum of understanding on April 9, 2003. It offered an $8000 bonus to per diem nurses who transferred to full-time employment during the 30-day window from April 1 to April 30, 2003.

Per diem nurse Kathy Raymore transferred pursuant to this program on April 7, 2003. Although the program was not in effect in July, nevertheless, per diem nurse Damon Lewis transferred effective July 15, 2003, pursuant to the terms of the second memorandum of understanding but outside the dates April 1 to April 30, 2003. Respondent concedes that Lewis transferred outside the timeframe envisioned in the second memorandum of understanding. This was the only instance of transfer outside the time limits of the second memorandum of understanding. After receiving the first $1000 installment of the sign-on bonus, Lewis requested transfer from full-time to per diem status. The Union was not involved in any of the discussions between Lewis and Respondent.

E. Alleged refusal to bargain regarding sign-on and relocation bonuses

The parties' nursing and technical contracts contemplate midterm wage reopening. The parties may also select additional topics to negotiate. The third midterm negotiation session was held on September 4, 2003. Present for Respondent were vice-president and general counsel Alex Valdez; Tom Finley, professional negotiator for Respondent; Brantley; and Jackie Laing, former chief nursing director.[4] Present for the Union were Shirley Cruse, lead Union negotiator for both the nursing and technical units; and Delma DeLora, head of the nursing unit. At this meeting the Union presented proposals for applicant sign-on and relocation bonuses and requested bargaining.

On September 24, 2003, Respondent refused to bargain regarding applicant sign-on and relocation bonuses. Respondent's position was that applicants for employment were not employees within the bargaining unit and, therefore, Respondent had no duty to bargain regarding their bonuses.

F. Analysis

Although applicants are not "employees" for purposes of Section 8(a)(5) of the Act,[5] the sign-on and relocation bonuses paid to applicants, when they become employees, are wages.[6] Thus, the sign-on and relocation bonuses have more than an "indirect or incidental impact on unit employees."[7] Because the subject of new hire wages "materially or significantly affects unit employees' terms and conditions of employment,"[8] Respondent was required to bargain regarding the sign-on and relocation bonuses.[9] Finally, the Union did not clearly and unmistakably waive the right to bargain by agreeing to management rights clauses that ceded generally to Respondent the right to hire.[10] Thus I find that Respondent violated the Act by unilaterally granting sign-on and relocation bonuses to applicants for employment without prior notice to the Union, by dealing directly with employees regarding these sign-on and relocation bonuses, and by refusing to bargain with the Union regarding sign-on bonuses and relocation bonuses to be offered to applicants for employment. Finally, I find that Respondent bypassed the Union and dealt directly with unit employees regarding the sign-on bonuses and relocation bonuses and a transfer bonus.[11]

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[4] The current chief nursing director was on a pre-planned vacation. Laing sat in to assist Respondent's negotiators on nursing issues.

[5] *Star Tribune,* 295 NLRB 543, 546 (1989); see generally, *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 164 (1971)("This obligation [to bargain collectively] extends only to the 'terms and conditions of employment' of the employer's 'employees in the unit appropriate for such purposes' that the union represents.")

[6] *Richfield Oil Corp.,* 110 NLRB 356, 359 (1954), enfd. 231 F.2d 717, 724 (1st Cir. 1956), *cert. denied,* 351 U.S. 909 (1956), relied upon by counsel for the General Counsel.

[7] *United Technologies Corp.,* 274 NLRB 1069 (1985), enfd. 789 F.2d 121 (2d Cir. 1986).

[8] *Id.* Additionally, although selection of individuals for hire may be entrepreneurial in nature, the calculation of relocation and sign-on bonuses is not.

[9] *Monterey Newspapers, Inc.,* 334 NLRB 1019, 1020 (2001)("We agree with the judge that the wage rates that job applicants were offered (and, thus, that newly hired employees were paid) are mandatory subjects of bargaining.")

[10] See, e.g., *Johnson-Bateman Co.,* 295 NLRB 180, 184 (1989).

[11] Respondent's communications with represented employees regarding wages, to the exclusion of the Union, constitutes direct dealing. See, e.g., *United Technologies Corp.,* 274 NLRB 1069, 1074 (1985).

Conclusions of Law

1. By granting sign-on and relocation bonuses to applicants for employment and by granting a transfer bonus to an employee without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By refusing to bargain collectively with the Union about sign-on and relocation bonuses to be offered to applicants for employment, Respondent violated Section 8(a)(1) and (5) of the Act.

3. By bypassing the Union and dealing directly with unit employees regarding sign-on and relocation bonuses and a transfer bonus, Respondent violated Section 8(a)(1) and (5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

Respondent, St. Vincent Hospital, Santa Fe, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Granting sign-on and relocation bonuses to applicants for employment without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

   b. Refusing to bargain collectively with the Union about sign-on and relocation bonuses to be offered to applicants for employment.

   c. Bypassing the Union as the exclusive representative of employees in the nurses and technical bargaining units and dealing directly with them by granting sign-on and relocation bonuses and a transfer bonus.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

d. Refusing to bargain collectively with the Union about sign-on and relocation bonuses to be offered to applicants in the nurses and technical units.

e. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units concerning sign-on and relocation bonuses for applicants for employment and transfer bonuses for current employees, and, if an understanding is reached, embody the understanding in a signed agreement:

Nurses Unit: All registered nurses and licensed practical nurses employed by Respondent, excluding all other employees, all other professional and technical employees, confidential employees, clerical employees, aides, orderlies, dieticians, pharmacists, head nurses, guards, watchmen, and supervisors as defined in the Act as amended.

Technical Unit: All respiratory therapists, x-ray technicians, radiation therapists, EKG technicians, EEG technicians, and Polysom technicians, excluding all other employees, all professional employees, casual employees, guards, watchmen and supervisors as defined in the Act.

b. Within 14 days after service by the Region, post at its facility in Santa Fe, New Mexico, copies of the attached Notice marked "Appendix."[13] Copies of the Notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since April 7, 2003.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

c. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated August 4, 2004
San Francisco, California

Mary Miller Cracraft
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT grant sign-on and relocation bonuses to applicants for employment or transfer bonuses to current employees without prior notice to National Union of Hospital and Health Care Employees District 1199NM, AFSCME, AFL-CIO and without affording the Union an opportunity to bargain with us with respect to the bonuses and the effect of the bonuses.

WE WILL NOT refuse to bargain collectively with the Union about sign-on and relocation bonuses to be offered to applicants for employment.

WE WILL NOT bypass the Union and deal directly with unit employees regarding sign-on and relocation bonuses and transfer bonuses.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights.

WE WILL, upon request, bargain with the Union as the exclusive representative of employees in the Nurses Unit and the Technical Unit concerning sign-on and relocation bonuses and transfer bonuses and WE WILL embody any understanding reached in a signed agreement.

St. Vincent Hospital

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.